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No. 99-1680

IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

On Writ of Certiorari
to the Court of Appeals of Wisconsin

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Is a licensing scheme which acts as a prior restraint required to contain explicit language which prevents injury to a speaker's rights from want of a prompt judicial decision?

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Br. for *Amicus Curiae* The Liberty Project, No. 99-1680, *City News and Novelty, Inc.* v. *City of Waukesha, Wisconsin* 11, 38

BRIEF FOR RESPONDENT

OPINIONS BELOW

Opinions and orders were entered in this case at both the administrative and judicial levels. The unpublished findings of the Waukesha Common Council Ordinance and Licensing Committee are reproduced at Respondent's Lodging ("Resp. Lodging"), vol. I, tab 2.[1] The unpublished findings of the Waukesha Common Council are reprinted at Pet. App. 82a-84a. The unpublished findings of the Waukesha Administrative Review Appeals Board are reprinted at Pet. App. 72a-81a.

The Wisconsin circuit court's unpublished opinion and order holding in favor of Respondent City of Waukesha in Petitioner's state-law certiorari action is reprinted at Pet. App. 55a-71a. The Wisconsin court of appeals' unpublished opinion seeking to certify the case to the Wisconsin supreme court is reprinted at Pet. App. 44a-52a. The Wisconsin supreme court's unpublished order denying certification is reprinted at Pet. App. 53a. The Wisconsin court of appeals' order affirming the circuit court's decision is published at 604 N.W.2d 870 and reprinted at Pet. App. 1a-43a. The Wisconsin supreme court's unpublished order denying discretionary review is reprinted at Pet. App. 54a.

JURISDICTION AND SUGGESTION OF MOOTNESS

Petitioner filed a petition for a writ of certiorari on April 17, 2000. This Court granted certiorari, limited to the third question presented by the petition, on June 19, 2000. 120 S.

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[1] For the Court's convenience, Respondent is lodging relevant excerpts of the lower court record in three volumes. Volume I principally contains relevant administrative filings and rulings in chronological order. Volumes II and III contain the pleadings and transcripts from the administrative appeal.

Ct. 2687 (2000). Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

Respondent notes the possibility that this action is moot because even if this Court ruled in Petitioner's favor on the question presented, that ruling would not remedy any injury suffered by Petitioner.[2] This case arises because, pursuant to a municipal ordinance, Respondent City of Waukesha has refused to renew Petitioner's license to operate an adult business. Petitioner's state court complaint alleges that the City's action is invalid because, *inter alia*, the City's ordinance gives the City's decisionmakers effectively unbridled discretion. Resp. Lodging, vol. I, tab 11. If Petitioner had prevailed on that claim or any other that went to the merits of the licensing determination in this case, then the City's decision not to renew Petitioner's license presumably would have been invalidated. The state court of appeals held, however, that the licensing determination was entirely valid, Pet. App. 12a-18a, 29a-42a, and this Court declined to review that holding, 120 S. Ct. 2687 (2000). This Court instead granted certiorari limited to the question whether the Waukesha ordinance is invalid insofar as it fails to guarantee a "prompt judicial decision" on appeal from the City's licensing determination. *Id.*; see Pet. i.

So far as Respondent can determine, a ruling in Petitioner's favor on the single question on which this Court granted certiorari would not redress any injury suffered by Petitioner. Because of this Court's limited order granting certiorari, the lower courts' holding that the City properly declined to renew Petitioner's license is effectively final. All that is left in dispute is whether the lower courts should have issued their decisions on a more expeditious timetable. But

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[2] As discussed fully in the text, the possibility of mootness arose when this Court entered its Order granting certiorari limited to a single question. Respondent accordingly could not have brought the matter to the Court's attention in the brief in opposition.

that question is entirely academic to Petitioner, which no longer has a license and could not on the basis of any decision by this Court seek to have its license reinstated.

Put concretely, if this Court were to rule for Petitioner, the case would be remanded to the Wisconsin courts. Because this Court's holding would not call into question any other aspect of the Waukesha ordinance, the lower courts would simply reaffirm, on the basis of the law of the case, their holding that the City properly refused to renew Petitioner's license. See *Burch* v. *American Family Mut. Ins. Co.*, 543 N.W.2d 277, 279 (Wis. 1996); see also Pet. App. 28a (severing unconstitutional hearing provision). Similarly, res judicata would bar a subsequent plenary action by Petitioner seeking reinstatement of its license. See *Northern States Power Co.* v. *Bugher*, 525 N.W.2d 723, 727-28 (Wis. 1995). The case accordingly appears to be moot. See *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 72-73 (1983) (per curiam) (case mooted when petitioner's injury would remain the same "irrespective of the outcome" in this Court); *Richardson* v. *McChesney*, 218 U.S. 487, 492 (1910) ("The thing sought to be prevented has been done, and cannot be undone by any judicial action.").

So far as Respondent can determine, four arguments that Petitioner could raise in asserting a concrete interest in the outcome of this case are unavailing. First, Petitioner could not apply for a new license and thereby benefit from a decision in its favor in this case. The City's decision not to renew Petitioner's license disables Petitioner as a matter of law from reapplying for a license at that location for one year. Wauk. Mun. Code § 8.195(7)(e). Moreover, Petitioner has made clear its intention to cease operations in Waukesha permanently. See Resp. Lodging, vol. I, tab 14. See generally *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969) (case moot although plaintiff might again run for Congress, because "[w]e think that under all the circumstances of the case the fact that it was most unlikely that the Congressman would again be a

candidate for Congress precluded a finding that there was 'sufficient immediacy and reality' here"); *Brownlow* v. *Schwartz*, 261 U.S. 216, 217 (1923) ("The case has become moot for two reasons: (1) because the permit, the issuance of which constituted the sole relief sought by petitioner, has been issued and the building to which it related has been completed, and (2) because, the first reason aside, petitioner no longer has any interest in the building, and therefore has no basis for maintaining the action.").

Second, this is not one of the limited classes of cases in which the normal case-or-controversy requirement should be relaxed because the question is capable of repetition yet evading review. See *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam). It is correct that an adult business's license generally will expire before this Court can rule on a challenge of this sort. But adult businesses are free to challenge the constitutionality of licensing ordinances in plenary actions at any time. See *infra* at 37-38. Such suits generally are not mooted by the passage of time because (a) the adult business continues to satisfy the requirements for a license, or (b) the challenge is brought by an applicant for a *new* license, as in *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990). Indeed, it appears that every other decision involved in the circuit conflict on the question presented by this case arose from a plenary civil rights action. See Pet. App. 21a-22a (collecting cases). So far as the decisions of the courts of appeals reflect, none of those cases became moot on appeal.

Third, this case is not saved from mootness on the ground that it is a facial challenge to the Waukesha ordinance. A party may bring a facial challenge alleging the overbreadth of a statute before its application. *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). But that party must still have a concrete interest in the outcome of the challenge. See *FW/PBS*, 493 U.S. at 233-35.

Fourth, petitioner could not assert a right to damages or any other remedy on the basis of a holding in its favor by this Court. Petitioner's complaint includes a generic claim for appropriate relief but does not state a claim for damages (see Resp. Lodging, vol. I, tab 11, at 4-5), and Petitioner has never requested damages at any stage of the case. Moreover, the City did not in fact revoke Petitioner's license or otherwise take any action against City News & Novelty during the pendency of the state court proceedings. Instead, the Common Council passed a resolution expressly stating that Petitioner would be allowed to continue operating at least until the trial court's decision on Petitioner's appeal, Resp. Lodging, vol. I, tab 9 – precisely the same result as Petitioner maintains is required by the First Amendment.

For the foregoing reasons, the Court may find it appropriate to dismiss the petition for a writ of certiorari as improvidently granted. See *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 621 n.1 (1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech * * * ." The provisions of Waukesha Municipal Code § 8.195 are reprinted in the appendix to this brief at 1a-14a. The provisions of Chapter 68 of the Wisconsin Statutes are reprinted in the appendix to this brief at 15a-21a.

Respondent calls to the Court's attention an amendment to Section 8.195 that, while relevant to this case, does not affect the question on which this Court granted certiorari for the reasons discussed *infra* at 20-24. See *Diffenderfer* v. *Central Baptist Church of Miami, Fla.*, 404 U.S. 412, 414 (1972) (per curiam) (this Court will "review the judgment * * * in light of [the] law as it now stands, not as it stood when the judgment below was entered" (citing *Hall* v. *Beals*, 396 U.S. 45, 48

(1969); *United States* v. *Alabama*, 362 U.S. 602, 604 (1960))). In the proceedings below, the Wisconsin court of appeals invalidated and severed subsection (3)(d) of the Waukesha ordinance, which guaranteed an adult business the right to a hearing on appeal from a decision not to grant or renew a license. The court of appeals held that the hearing provision failed to provide a specific deadline for ruling after the hearing. Pet. App. 25a-26a. In response to that decision, the Waukesha Common Council amended subsection (3)(d) to guarantee that "[a] final determination stating the reasons therefore, together with a copy of any official recording or transcript of the hearing, shall be rendered within 20 days of the commencement of the hearing."

STATEMENT

Respondent first outlines the requirements for securing and renewing a license to operate as an adult business in Waukesha, Wisconsin. It then recounts the procedural history of this case, including the bases for the City's refusal to renew the license of Petitioner City News & Novelty.

I. WAUKESHA'S ADULT BUSINESS LICENSING SCHEME

Respondent City of Waukesha is located sixteen miles west of Milwaukee, Wisconsin and has a population of approximately 64,000. An "adult oriented establishment" must have a license to operate in Waukesha. See Wauk. Mun. Code ("WMC") § 8.195(2). Licensing is governed by the Municipal Code, which defines such an establishment to include businesses that feature topless dancers or strippers, that provide facilities to view adult films, or that have as a substantial portion of their stock in trade the sale, rental, or viewing of adult films or periodicals. *Id.* § 8.195(1); see also *id.* (defining adult films and periodicals by reference to specified anatomical areas and sexual activities).

In enacting the ordinance, the City concluded based on the experience of other municipalities that adult businesses can

lead to "increased levels of criminal activities including prostitution" and other dangerous transient sexual acts, and furthermore can undermine the value of surrounding properties. WMC § 8.195 (preamble). The requirements of the ordinance seek to target these adverse secondary effects directly. Particularly relevant to this case, an adult business may not admit minors, may not permit customers to engage in sexual acts on the premises, and must ensure that any booths for viewing adult films are open, accessible, and well lighted. WMC § 8.195(9)(a), (b), (c), (10)(c). Thus, in determining whether to grant or renew a license, the City does not inquire into the content of the applicant's speech, as by determining whether films or periodicals are obscene, which is a matter left entirely to state law. See Wis. Stat. § 944.21. Nor do the criteria for securing a license restrain speech in any respect.

A license to operate an adult establishment, once granted, must be renewed annually. WMC § 8.195(7)(a). Renewal applications should be filed at least sixty days before expiration, but the only penalty for failing to meet that deadline is that the City assesses a late fee of $100. *Id.* § 8.195(7)(a), (b).

The initial determination whether to renew a license is made by the Common Council (which is the city council) based on a recommendation by its Ordinance and Licensing Committee. Throughout the administrative process, the burden of proving that a license should not be renewed rests on the city attorney. Pet. App. 80a-81a. The City makes an initial determination whether to renew a license within twenty-one days of receiving the application, and the city clerk is tasked with notifying the applicant of the ruling. WMC § 8.195(3)(c).

If the City declines to renew a license, only the business may appeal; municipal officials may not at any stage of the administrative process seek review of a decision to renew a license. Specifically, the adult business may elect to appeal the nonrenewal determination under either the municipal code, see WMC § 8.195(3)(d), or state law, see Wis. Stat. ch.

68. (The state scheme remains available under Wisconsin law unless a municipality expressly elects not to follow it, see *Tee & Bee, Inc.* v. *City of West Allis*, 571 N.W.2d 438, 441 (Wis. Ct. App. 1997) (citing Wis. Stat. § 68.16), which Waukesha has not done, see WMC §§ 2.11(1), 8.195(11); Pet. App. 23a, 28a.)

Under the municipal scheme, including the amended hearing provision (see *supra* at 5-6), the City's decisionmaking takes a maximum of fifty-one days. Within ten days of an initial nonrenewal decision by the City, the business may file an appeal with the City's Administrative Review Appeals Board ("Appeals Board"), required to be an impartial decisionmaker, which must hold a hearing within ten days. WMC § 8.195(3)(d) (incorporating Wis. Stat. § 68.11(2)). The hearing permits representation by counsel, the presentation of evidence and witnesses sworn under oath, and cross-examination of opposing witnesses. *Id.* The adult business's counsel may issue subpoenas. *Id.* The business may also require that an official record of the proceedings be made at the City's expense. *Id.* (incorporating Wis. Stat. § 68.11(3)). The Board must issue a ruling, together with a copy of the record, within twenty days of the commencement of the hearing. WMC § 8.195(3)(d).

If the adult business exercises its right to pursue an appeal under the alternate state system instead, the City's decisionmaking takes a maximum of seventy-one days because the business proceeds through an additional stage of review and because the time periods for appealing and for conducting the hearing before the Appeals Board are extended. An initial determination not to renew a license may be appealed within thirty days to the Common Council, which must make its decision within fifteen days. Wis. Stat. §§ 68.08, 68.09(3). If the Council votes not to renew the license, the business may within thirty days seek review before the Appeals Board, which must hold a hearing within fifteen days and issue a

ruling within twenty days thereafter. *Id.* §§ 68.10(2), 68.11(1), 68.12(1).

Under either the municipal or the state scheme, if the Appeals Board votes not to renew a license, the business may *as a matter of right* secure judicial review by filing a state circuit court certiorari action within thirty days. Wis. Stat. § 68.13; WMC § 8.195(3)(d). In such an action, the City's licensing determination carries a presumption of correctness, such that the court will inquire only whether "(1) the board kept within its jurisdiction; (2) the board acted according to the law; (3) the action was arbitrary, oppressive or unreasonable; and (4) the evidence presented was such that the board might reasonably make the order or determination in question." Pet. App. 8a (citing *State* v. *Goulette*, 222 N.W.2d 622, 626 (Wis. 1974)); see also *id.* 55a-56a. Nor may the court "add to the record or take new evidence except in unusual circumstances." *Id.* 70a. The court "may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision." Wis. Stat. § 68.13(1). These remedies, however, are not exclusive. *Id.* § 68.01.

II. The Nonrenewal of Petitioner's License

1. Petitioner's violations of the ordinance.

Beginning in 1989, Petitioner City News & Novelty operated in the heart of downtown Waukesha, two doors from a children's toy store and near several churches. Petitioner sold a variety of products, including drug paraphernalia (such as pipes and rolling papers generally used for smoking marijuana) and sexual novelty items. Petitioner also provided booths in which patrons could watch pornographic videotapes and sold a variety of pornographic videotapes and magazines. Because these adult materials constituted a substantial portion of its stock in trade, Petitioner was required to be licensed as an adult oriented establishment. See WMC § 8.195(2)(a).

From 1990 to 1994, Petitioner annually requested and received renewals of its license. There is no suggestion in the record that the City, either in that period or later, *ever* harassed or improperly treated Petitioner or its customers.

This case arises because Petitioner persistently violated the municipal code in late 1994 and throughout 1995. On several occasions, police officers found minors on the premises. Patrons in several instances were found engaging in sexual acts and exposing themselves to others in the store. (Rather than detail here the explicit nature of the sexual acts, some of which go well beyond what Petitioner euphemistically describes as "solitary lewd conduct," Pet. Br. 9, Respondent directs the Court's attention to the administrative record. See Resp. Lodging, vol. I, tab 2, at 2; *id.*, tab 10, at 6-11.) Petitioner also modified the entrance to its booths to obstruct open visibility and failed to correct that violation of the code despite repeated warnings from the city's building inspector. *Id.*, tab 10, at 8-9.

2. THE ADMINISTRATIVE PROCEEDINGS.

On November 17, 1995, Petitioner applied for renewal of its operating license for the annual period beginning January 26, 1996. Resp. Lodging, vol. I, tab 1. The application was considered at the December 18, 1995, meeting of the Common Council's Ordinance and License Committee, which voted to recommend nonrenewal based on Petitioner's numerous violations of the municipal code over the previous year. *Id.*, tab 2. The Common Council adopted that recommendation the next day. *Id.*, tab 3.[3]

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[3] Apparently due to issues relating to the scheduling of Council meetings, the City in this case made its determination in 31 days, rather than the 21 days specified by WMC § 8.195(3)(c). Respondent does, however, view the 21-day deadline as binding (and, indeed, will defer the expiration of a license for the length of any period in which the City fails to comply with a mandatory deadline),

Because Petitioner informally advised the City of its intention to appeal pursuant to the state scheme rather than the municipal scheme, the Common Council scheduled the matter for consideration at its next meeting on January 16, 1996. But by that date, some four weeks after the initial determination, Petitioner still had not appealed. Resp. Lodging, vol. I, tab 4. Petitioner waited until the last possible day (which fell only a week before its license was set to expire) to file its short notice of appeal. *Id.*, tab 5. Within days, the Council held a special session, at which it reviewed Petitioner's application and decided against renewal. *Id.*, tab 6. At that time, the Council passed a resolution guaranteeing Petitioner's right to operate pending review before the municipal Appeals Board. *Id.*

Petitioner waited a full three weeks before filing its one-sentence petition for review before the Appeals Board. Resp. Lodging, vol. I, tab 7. Petitioner also advised the City that it was waiving all time limits on the disposition of its appeal. *Id.*, tab 8; see also Wis. Stat. § 68.09(3) (providing that applicant may waive applicable deadlines).

Subsequently, the Council passed a special resolution further extending Petitioner's license to operate pending any later judicial review in state trial court. Resp. Lodging, vol. I, tab 9. As would become apparent, Petitioner therefore had no incentive to proceed through the appeals process expeditiously. (*Amicus* Liberty Project thus is correct, Br. 14, that "17 months elapsed between City News's application for a license and the first judicial decision on the merits," but responsibility for that delay lies squarely on the shoulders of Petitioner.)

The Appeals Board met four times regarding Petitioner's license. Resp. Lodging, vols. II and III (transcripts). The additional dates were provided principally to accommodate Pe-

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which is the relevant point for purposes of this facial challenge to the ordinance.

titioner's request that it be able to locate, interview, and subpoena witnesses who had knowledge of Petitioner's alleged violations of the municipal code and because Petitioner made extraordinarily extensive use of its right to examine witnesses and to raise objections. At the hearings, detailed testimony was received. Both Petitioner and the city attorney (who opposed renewal) also submitted extensive briefs and proposed findings of fact, as well as responses to each other's submissions. *Id.*, vol. II, tabs 1-6. On June 28, 1996, the Board issued a decision sustaining the nonrenewal determination and setting forth detailed reasons for its decision. *Id.*, vol. I, tab 10.

3. THE CIRCUIT COURT PROCEEDINGS.

Petitioner commenced this suit on July 15, 1996, filing a state-law certiorari action to appeal the City's decision not to renew its license. Resp. Lodging, vol. I, tab 11. Petitioner did not challenge either the constitutionality of the Wisconsin state law statutory scheme for appealing licensing determinations or the renewal criteria set forth in WMC § 8.195. See Pet. App. 57a (trial court ruling; "plaintiff is not attacking Wisconsin Statute Chapter 68"); *id.* 59a ("Plaintiff does not attack the nature of the conduct which 'if found' constitute a violation of the ordinance."). Instead, the complaint alleged that the nonrenewal was invalid because the City's decision was based on insufficient evidence, because the nonrenewal determination rested on conduct not properly attributable to Petitioner, because Petitioner allegedly did not have sufficient notice of its violations of the municipal code, and because "Ordinance No. 8.195 is void and unconstitutional." Resp. Lodging, vol. I, tab 11, at 3-4. Petitioner subsequently delayed the circuit court's ruling on its complaint, successfully requesting a forty-five-day extension of time to file its brief on the merits and a further fifteen-day extension to file its reply brief. *Id.*, tab 12.

After briefing was completed, the circuit court ruled for Respondent. See Pet. App. 55a-71a. The court first rejected

each of Petitioner's facial challenges to WMC § 8.195. The court concluded that the ordinance sufficiently limits the discretion of city officials, given that it sets out express criteria for renewal and specifies that particular municipal violations must be found in order to justify nonrenewal, a determination that "is then subject to review [in court] under the substantial evidence test." Pet. App. 58a-60a. Furthermore, the ordinance sets sufficient time limits on the licensing determination because it contains specific time periods and the City specifically must complete all inspections of an adult business within the twenty-one-day period for making a license determination. *Id.* 60a-64a.

The circuit court also rejected each of Petitioner's specific arguments regarding the application of WMC § 8.195 in this case. The court concluded that the City's decision had been made by impartial decisionmakers at each stage and that the City had provided Petitioner with sufficient warning of the charged violations of the municipal code. Pet. App. 65a-69a. The City also was justified in refusing to renew Petitioner's license rather than merely suspending it, a decision that is "within the discretion of the licensing authority." *Id.* 69a. Finally, each of the violations found by the Board was supported by substantial evidence. *Id.* 70a-71a.

4. THE APPELLATE PROCEEDINGS.

On Petitioner's appeal, the Wisconsin court of appeals affirmed, Pet. App. 1a-43a,[4] specifying from the outset (as had the circuit court) that Petitioner challenged only the

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[4] The case was delayed in the court of appeals for two reasons outside the parties' control. The court of appeals unsuccessfully sought to refer the case to the state supreme court. Pet. App. 44a-52a, 53a. The court of appeals also stayed the proceedings on appeal for nine months pending the state supreme court's decision in another case, *County of Kenosha* v. *C & S Management*, 588 N.W.2d 236 (Wis. 1999), which ultimately proved nondispositive in this case.

Waukesha ordinance, not the separate state scheme. Pet. App. 2a (court of appeals ruling; explaining that petitioner alleged "that the City's adult establishment licensing scheme is unconstitutional"); *id.* 28a ("ch. 68 sets forth narrow, definite and objective standards for bringing an appeal, and City News does not directly challenge this chapter").

The court of appeals held that the immediate availability of judicial review as a matter of right through a certiorari proceeding to challenge the nonrenewal of a license constitutes "prompt judicial review" as required by this Court's decision in *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990). See Pet. App. 22a. The court of appeals specifically contrasted this Court's determination in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), that a content-based censorship law "must 'assure a *prompt final judicial decision*,'" Pet. App. 20a (quoting 380 U.S. at 59) (emphasis in court of appeals' opinion), with Justice O'Connor's later determination for the plurality in *FW/PBS* that a content-neutral licensing scheme need only provide "the 'possibility' and 'availability' of prompt judicial *review*," *id.* (quoting 493 U.S. at 227, 228 (emphasis added)). Moreover, a municipality does not even have the power to require a state court to decide a licensing challenge on an expedited schedule. *Id.* 22a. The court of appeals therefore held, agreeing with the First, Fifth, and Seventh Circuits, that "prompt *access* to judicial review qualifies as 'prompt judicial review'" under *FW/PBS*. *Id.* 21a-22a (emphasis in original). That requirement was fully met here because Petitioner had the right, which it duly exercised, to file a certiorari action immediately after the Appeals Board's decision. *Id.*

The court of appeals rejected Petitioner's remaining allegations that WMC § 8.195 is facially invalid, holding that "the City's licensing scheme does set forth specific guidelines and expressly provides that a violation of such guidelines constitutes a ground for nonissuance or nonrenewal." Pet. App. 15a. Furthermore, the ordinance both provides a specific twenty-one-day time limit in which the City must make the renewal determination and also maintains the status quo during the renewal determination "because the common council's review of an application is completed prior to expiration of the license." *Id.* 19a. Finally, an application must be reviewed by an impartial decisionmaker. *Id.* 29a (citing Wis. Stat. § 68.11(1)).

The court of appeals also rejected Petitioner's challenges to the application of WMC § 8.195 in this case. Not only were the City's decisionmakers impartial, but the City also satisfied every other requirement of due process, "providing notice of the charges, an opportunity to respond to and challenge the charges, an opportunity to present witnesses, and an opportunity to confront and cross-examine opposing witnesses." Pet. App. 31a-36a. Moreover, nonrenewal rather than mere suspension was the appropriate sanction for Petitioner's "*nine* separate ordinance violations occurring within a one-year period." *Id.* 37a (emphasis added). Indeed, because multiple violations resulted in convictions of a City News & Novelty director, "suspension [was] not an available sanction in this case." *Id.* Finally, substantial evidence (including sworn testimony of several police officers) supported each finding of a violation by Petitioner. *Id.* at 38a-42a.

The court of appeals did agree with Petitioner, however, that WMC § 8.195 was invalid in a single respect that the City has since corrected by amending the ordinance. See *supra* at 5-6. Under subsection 3(d) as then enacted, if an applicant appealed from a nonrenewal determination, the Common Council was required to conduct a hearing within ten days, but otherwise was "given no direction as to what it must do following the hearing or when it must presumably take action in response to the hearing." Pet. App. 25a-26a. In the court of appeals' view, the ordinance thereby "create[d] a risk of an indefinite delay by putting an applicant at the mercy of the licensing body." *Id.* 25a. But the court of appeals concluded that, as a matter of Wisconsin law, the invalid public hearing

provision was severable from the remainder of the city ordinance, which was otherwise constitutional. *Id.* 26a-28a. In response to the court of appeals' decision, Waukesha amended subsection 3(d) to specify that the Council must issue a decision within twenty days of the commencement of the hearing. See *supra* at 5-6.[5]

5. THIS COURT'S ORDER GRANTING CERTIORARI.

After the Wisconsin supreme court denied Petitioner's request for review, Pet. App. 54a, this Court granted certiorari limited to the third question presented by Petitioner: whether "a licensing scheme which acts as a prior restraint [is] required to contain explicit language which prevents injury to a speaker's rights from want of a prompt judicial decision." Pet. i; 120 S. Ct. 2687 (2000) (order granting certiorari). The petition for certiorari explained that the court of appeals' determination that the First Amendment does not require a prompt judicial decision on an appeal from a licensing determination was the subject of a conflict in the circuits. Pet. 15-16. The Court declined to consider, however, Petitioner's challenges that went to the merits of the actual licensing determination in this case – *viz.*, whether the burden of persuasion should have been placed on the City in the judicial proceedings and whether WMC § 8.195 grants the City effectively unbridled discretion to refuse to renew a license.

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[5] Compare WMC § 8.195(3)(d) (as at Oct. 20, 1999), *quoted in* Pet. App. 24a ("If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter before the Council or its designated committee as hereinafter provided.") *with* WMC § 8.195(3)(d) (current version) ("If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter in conformity with sec. 68.11(2), (3), Wis. Stats. A final determination stating the reasons therefore, together with a copy of any official recording or transcript of the hearing, shall be rendered within 20 days of the commencement of the hearing.").

SUMMARY OF ARGUMENT

I. Petitioner principally argues that Chapter 68 of the Wisconsin Code is unconstitutional because it fails to guarantee that an adult business's license-renewal application will be ruled upon before the license expires. That argument fails because an adult business may forgo Chapter 68's administrative appeal procedures and instead utilize the municipal scheme provided by WMC § 8.195(3)(d), under which administrative review will be completed before its license expires.

In any event, Petitioner's challenge to Chapter 68 is not properly presented. This Court granted certiorari limited to the question whether WMC § 8.195 is invalid because it fails to guarantee a "prompt judicial decision" on appeal from an administrative licensing decision. Petitioner's argument, by contrast, is a challenge to Chapter 68 (not WMC § 8.195) and to the time limits for rendering an administrative decision (not the time limits for rendering a judicial decision on appeal). Indeed, Petitioner waived the argument it presses here by failing to raise it in the lower courts.

II. WMC § 8.195 is constitutional because it provides an adult business with "access" to "prompt judicial review" as required by the plurality in *FW/PBS, Inc.* v. *City of Dallas*. The adult business may appeal as a matter of right from the administrative proceedings, which (as noted) will conclude before its license expires. Petitioner relies on inapposite decisions (principally *Freedman* v. *Maryland* and its progeny) holding that the First Amendment requires a "prompt judicial *decision*" on appeal from a determination by a *censor* that speech should be prohibited based on its *contents*. By contrast, the ordinance at issue here (like the ordinance in *FW/PBS*) involves no censorship and no evaluation of the content of Petitioner's speech.

The prophylactic concerns underlying the *Freedman* line of cases thus are inapplicable here. First, the *FW/PBS* plural-

ity squarely rejected the argument that an adult business will be deterred from applying for a license by the absence of a guaranteed "prompt judicial decision." That conclusion is amply justified with respect to WMC § 8.195, which provides adult businesses with numerous procedural protections. In addition, an adult business may secure injunctive relief to prevent the expiration of its license in appropriate cases.

Second, a "prompt judicial decision" is not required on the ground that courts have unique expertise in this area. Unlike determinations regarding the content of protected speech, it is *municipalities* that have expertise in determining whether content-neutral regulatory ordinances have been violated. Here, for example, a court has no particular expertise in determining whether minors were found on Petitioner's premises and whether patrons were engaging in sex acts on the premises. And, again, the ordinance's numerous procedural protections guarantee that the administrative process will be fair and thorough. To be sure, courts do have special expertise in determining whether municipal ordinances are themselves constitutional, but such claims are properly brought as plenary civil rights actions in court.

Petitioner's remaining arguments for extending the "prompt judicial decision" requirement to the context of municipal licensing are unavailing. Petitioner primarily argues that municipal officials are unfaithful to the Constitution, a scurrilous claim that has no foundation in the record. Petitioner also fails to acknowledge the sea change its theory would work in municipal law and the role of the courts. Adult businesses would have a free pass to violate any content-neutral regulation, such as tax and sanitation laws, until the courts approved an appropriate administrative sanction. The same would of course be true for expressive businesses of every kind, including publishers, newsstands, and movie theaters. Nothing in the *Freedman* line of cases supports such an extraordinary result.

ARGUMENT

I. PETITIONER'S PRINCIPAL ARGUMENT, IN WHICH IT CHALLENGES THE TIMING OF ADMINISTRATIVE DECISIONMAKING UNDER A WISCONSIN STATE STATUTE, IS BOTH WRONG AND IRRELEVANT TO THE QUESTION PRESENTED.

Petitioner's principal argument in this Court is that a Wisconsin state law, Chapter 68 of the Wisconsin Statutes, is invalid because it fails to guarantee that a municipality will issue a decision on an application to renew an adult business license before the license expires. Specifically, although an adult business in Waukesha may submit a renewal application sixty days prior to expiration of its license, the state statute permits the municipality a longer period – up to seventy-one days – to complete the administrative process. Indeed, Petitioner maintains, the time may be still longer because the statute does not specify how long a required "hearing" may last. See, *e.g.*, Pet. Br. 19-20.

1. THE FIXED ADMINISTRATIVE TIME LIMITS SATISFY THE FIRST AMENDMENT.

Petitioner's arguments need not detain this Court because, wholly apart from the state statute, the Waukesha ordinance itself guarantees that the administrative process will be completed in less than sixty days and further specifies the length of the administrative appeal hearing. In response to the decision of the court of appeals invalidating a prior version of the municipal hearing provision, WMC § 8.195(3)(d), the City amended that subsection of the ordinance to provide that the Appeals Board must issue a "final determination * * * together with a copy of any official recording or transcript of the hearing * * * within 20 days of the commencement of the hearing." As a result, the City has a maximum of fifty-one days to complete the administrative review process. In this facial challenge, in which Petitioner seeks prospective relief, it is the current version of the ordinance that is relevant to this

Court's decision. *Diffenderfer* v. *Central Baptist Church of Miami, Fla.*, 404 U.S. 412, 414 (1972) (per curiam), *quoted supra* at 5. The Court's practice is reflective of the sound view that the lower courts should be given the first opportunity to address the constitutionality of an amended statute or ordinance. See, *e.g.*, *Fusari* v. *Steinberg*, 419 U.S. 379, 389 (1975); cf. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (noting the advantage of "procuring the benefit of the lower court's insight before we rule on the merits").

Petitioner is correct that under the separate statutory scheme, the administrative process may take up to seventy-one days. But that hardly makes the statute unconstitutional, given that the adult business has the option of pursuing the more expeditious municipal appeals process. Moreover, even if it prefers the state scheme, the adult business is free to submit its renewal application more than seventy-one days before its license expires. See WMC § 8.195(7)(a) (application should be submitted a *minimum* of sixty days in advance). On Petitioner's alternative view, the entire administrative scheme must be held unconstitutional because the City will accept renewal applications up to the date that an applicant's license expires, see *id.* § 8.195(7)(b), which by definition means that in some instances an applicant can choose to apply later than the minimum time the City may take to make its decision. This accordingly is not a case in which a licensing scheme is invalid because there is "no means by which *an applicant* may ensure" that its application will be decided in a timely manner. *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990) (plurality opinion) (emphasis added).

2. PETITIONER'S ARGUMENT IS OUTSIDE THE SCOPE OF THE QUESTION PRESENTED.

Petitioner's argument is also irrelevant because this Court granted certiorari on a very different issue: whether a licensing scheme is "required to contain explicit language which prevents injury to a speaker's rights from want of a prompt *judicial* decision." Pet. i (emphasis added); see 120 S. Ct. 2687 (2000) (granting certiorari limited to question three). As the petition for certiorari explained, the lower courts are divided over whether a municipal licensing scheme is invalid if it fails to guarantee that the adult business's appeal will be promptly decided. Pet. 15-16; see also Pet. App. 21a-22a. In this case, the Wisconsin court of appeals agreed with the First, Fifth, and Seventh Circuits that *FW/PBS, Inc.* v. *City of Dallas* requires only that the municipality provide access to prompt judicial review, although it noted the contrary view of other courts of appeals. Pet. App. 21a.

In an attempt to suggest that its arguments fall within the question presented, Petitioner makes three substantial misstatements. First, Petitioner seriously misstates the question presented, asserting that this Court agreed to consider: "When a licensing ordinance contains a renewal requirement, must the ordinance include explicit language to prevent injury to a speaker's rights from want of a prompt *administrative* or judicial decision?" Pet. Br. 14 (emphasis added). *Compare* Pet. i. Petitioner's attempted addition of "administrative" is critical here, for it raises entirely different questions under the First Amendment and does not implicate the circuit conflict that caused this Court to grant certiorari.

Second, Petitioner incorrectly asserts that in the proceedings below it challenged the timing of administrative proceedings under the state statutory scheme and specifically the statutory provision for holding an administrative hearing. According to Petitioner, it "raised the open-ended nature of administrative review under Chapter 68." Pet. Br. 12 n.12. In reality, Petitioner's complaint relates only to the Waukesha ordinance; it does not allege that those provisions of Chapter 68 are unconstitutional. See Resp. Lodging, vol. I, tab 11. Indeed, both the trial court and the court of appeals went to pains to note that Petitioner challenged only the Waukesha ordinance, not the separate state statutory scheme. See *supra* at 12, 14.

Petitioner cites two pages in its court of appeals brief as supposedly setting forth its challenge to Chapter 68. Pet. Br. 12 n.12 (citing Pet. C.A. Br. 23-24). Even if Petitioner had raised such a claim in the state court of appeals, upon which that court unquestionably never passed, it would not be presented here because the Wisconsin courts follow the traditional rule that claims not raised in the trial court cannot be raised for the first time on appeal. *Terpstra* v. *Soiltest, Inc.*, 218 N.W.2d 129, 133 (Wis. 1974). This Court, in turn, will consider only questions properly presented in or passed upon by the court below. *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

In any event, the cited pages of Petitioner's court of appeals brief – which Respondent is including in its lodging for the Court's convenience, see Resp. Lodging, vol. I, tab 13 – make no such argument. In a single sentence, Petitioner noted that Wis. Stat. § 68.09 includes "no requirement that the decision on review be made within any certain period of time." But this one sentence does not purport to be a free-standing challenge to deadlines under Chapter 68. Instead, Petitioner's point responded to the trial court's holding that the hearing provision of the Waukesha ordinance is valid because it, in turn, incorporates Section 68.09. Pet. App. 61a-62a. In disagreeing with the trial court on this issue, the court of appeals did not consider the requirements or the constitutionality of the state statute's hearing provision. *Id.* 24a-28a.

Third, and relatedly, Petitioner incorrectly states that the court of appeals passed upon the constitutionality of the timing of administrative decisions under Chapter 68, including specifically the statute's administrative hearing provision. Pet. Br. 12-13. Of course, because the decision below never purports to do any such thing, Petitioner is forced to contend in a footnote that "[t]he Court's upholding of the Chapter 68 procedures was implicit." *Id.* n.13. But at every turn, and as to every claim, the court of appeals made clear that it was

passing only on the constitutionality of the Waukesha ordinance.[6]

Petitioner fares no better in asserting that its challenges to Chapter 68 are fairly included within the question presented. According to Petitioner, "Because the open-ended nature of the administrative time frame necessarily delays the point in time at which judicial review may be initiated, such a flaw is within the scope of the question presented because it causes the time frame for judicial review to be open-ended and indefinite." Pet. Br. 19. In other words, Petitioner maintains that because Chapter 68 permits a municipality to take up to seventy-one days to review a license renewal application and does not set a fixed schedule for the hearing on appeal, an applicant will be unable to go to court on a date certain and, in turn, the statute by definition cannot guarantee "prompt judicial review."

In the first place, even if the legal *issue* raised by Petitioner were "fairly included" in the question presented, that

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[6] Pet. App. 9a ("**First Amendment Protections**. City News raises a number of facial challenges to the constitutionality of the City's licensing scheme."); *id.* 12a ("1. *Renewal Standards*. City News first contends that the ordinance is unconstitutional because it fails to provide explicit standards for license renewal."); *id.* 16a ("2. *Inadequate Time Limits*. City News contends that the City's licensing scheme is defective because it does not prescribe mandatory time limits for the application process."); *id.* 19a ("3. *Preserving the Status Quo*. City News contends that the ordinance is defective because it fails to explicitly require preservation of the status quo pending judicial review of a license denial or revocation."); *id.* 20a ("4. *Prompt Judicial Review*. City News next asserts that the ordinance does not guarantee 'prompt judicial review,' as established by the Supreme Court in ***Freedman***."); *id.* 24a (5. *Public Hearing Provision*. City News further argues that an indefinite time period is created as to the public hearing set forth under MUNICIPAL CODE § 8.195(3)(d).") (emphases in original) (paragraph numbering omitted).

would not justify passing on the constitutionality of a *statute* that was not addressed in the proceedings below. Furthermore, the administrative appeals procedure of Chapter 68 does not delay the availability of judicial review for an applicant, which can instead proceed under the more expeditious municipal scheme.

In any event, Petitioner's argument is a non sequitur. Because the court of appeals had invalidated the hearing provision set forth in the ordinance itself, this Court necessarily presumed in granting certiorari that it would determine whether the judicial review provisions of the Waukesha ordinance were, standing alone, invalid for failure to guarantee a "prompt judicial determination." On Petitioner's far broader view of the question presented, it has the right to challenge in this Court any aspect of the timing of the administrative proceedings – such as the deadlines for filing an application, the deadlines for the adult business to appeal, and the timing for providing a transcript of the hearing – all of which affect the point in time at which the adult business may pursue judicial review, but none of which has anything to do with the actual question presented.[7]

II. WAUKESHA MAKES PROMPT JUDICIAL REVIEW AVAILABLE TO APPLICANTS FOR ADULT-BUSINESS LICENSES.

Petitioner's argument that WMC § 8.195 is unconstitutional for failure to guarantee a "prompt judicial determination" on appeal from an administrative licensing decision is

[7] Indeed, Petitioner obliquely argues in this Court that the statute is unconstitutional because it does not guarantee when the applicant will be provided a transcript of the administrative proceedings. Pet. Br. 8. The amended Waukesha ordinance, however, guarantees that the applicant will be provided a copy of the transcript at the same time as the Appeals Board renders its decision. WMC § 8.195(3)(d).

unavailing. The decisions on which Petitioner relies all arise in a very different context: First Amendment challenges to laws permitting administrative decisionmakers to *censor* expressive materials based on judgments about the *content* of those materials. The Waukesha ordinance, by contrast, involves neither an inquiry into the content of the materials sold by Petitioner nor censorship of any kind. Moreover, as the plurality opinion in *FW/PBS, Inc.* v. *City of Dallas* makes quite clear, the prophylactic concerns underlying the "prompt judicial determination" requirement are absent here: there is no risk that adult businesses will elect not to pursue licenses and courts are not uniquely suited to making content-neutral licensing determinations (indeed, precisely the opposite is true). Finally, Petitioner's argument necessarily implies a right of all expressive businesses (including newsstands, movie rental stores, and television stations) to continue to operate pending judicial review notwithstanding their failure to follow all manner of content-neutral regulatory statutes (such as the obligation to pay taxes or to follow sanitation laws). That cannot be a correct reading of the First Amendment.

1. THE PROMPT JUDICIAL DETERMINATION REQUIREMENT APPLIES TO CONTENT-BASED CENSORSHIP SCHEMES, NOT CONTENT-NEUTRAL LICENSING ORDINANCES.

Petitioner's argument is flawed from the outset because it rests on precedents holding that a court must issue "a prompt judicial decision *of the question of the alleged obscenity* of" a work that has been censored. *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141 (1968) (per curiam) (emphasis added); see also *Fort Wayne Books* v. *Indiana*, 489 U.S. 46, 63 (1989) (precedents hold "that pretrial seizures of expressive materials could only be undertaken pursuant to a procedure designed to focus searchingly *on the question of obscenity*" (emphasis added) (internal quotation marks and multiple citations omitted)); *New York* v. *P.J. Video*, 475 U.S. 868, 873 (1986) (ju-

dicial determination relates to question of "obscenity" (multiple citations omitted)).

Thus, *Freedman* v. *Maryland* held that a state board of censors had the burden of securing a prompt judicial decision confirming an order prohibiting exhibition of a film. 380 U.S. 51 (1965). *Southeastern Promotions* v. *Conrad* applied the same requirement to a municipal review board authorized to determine which stage productions could, based on their content, appear at municipal theaters. 420 U.S. 546 (1975). See also *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam) (invalidating statute permitting seizure of films based on showing that theater previously screened obscene materials when, *inter alia*, statute failed to guarantee prompt judicial determination on question of obscenity); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971) (imposing prompt judicial determination requirement upon customs regulation authorizing seizure of "obscene or immoral" imported materials); *Blount* v. *Rizzi*, 400 U.S. 410 (1971) (invalidating statute authorizing Postmaster General to seize obscene materials for failure to guarantee prompt judicial determination); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968) (per curiam) (invalidating ordinance that banned exhibition without approval of board of censors but did not provide for prompt judicial determination).

In contrast to these decisions addressing content-based censorship schemes, this Court did not impose the "prompt judicial determination" requirement when it reviewed an adult-business licensing ordinance in *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990). Justice O'Connor's opinion for the plurality in *FW/PBS* recognized that "the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Id.* at 229. Thus, "the licensing scheme * * * does not present the grave 'dangers of a censorship system.'" *Id.* (quoting *Freedman*, 380 U.S. at 58). The

plurality accordingly concluded that the First Amendment requires a municipality only to guarantee the "possibility" or "availability" of "prompt judicial *review*," 493 U.S. at 228 (emphasis added), rather than, as was required in *Freedman* and its progeny, a "prompt judicial *determination*," 380 U.S. at 60 (emphasis added).[8] The plurality's conclusion followed directly from *Southeastern Promotions* and *Freedman*, which reasoned that the "prompt judicial determination requirement" rests on essentially the same ground as the procedural safeguard, not applicable to licensing schemes, requiring censors to institute judicial proceedings to confirm their decisions. *Southeastern Promotions*, 420 U.S. at 560; *Freedman*, 380 U.S. at 58.

The Waukesha ordinance makes "prompt judicial review" "available" to adult businesses, as required by the *FW/PBS* plurality. Under the time limits set by the ordinance, the City will complete its review of a renewal application, both as an initial matter and on administrative appeal, within fifty-one days. The ordinance provides that a renewal application should be submitted at least sixty days before the license expires. Because the adult business's essentially *pro forma* notice of administrative appeal takes almost no time to prepare and file, the applicant is assured that its license will remain in effect throughout the administrative process. Once that process is completed, if the City determines not to renew the license, the applicant may proceed immediately to court where, as we explain below, it may seek a restraining order requiring that the license remain in effect.[9] The ordinance thus guaran-

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[8] Thus, although the *FW/PBS* plurality described this procedural safeguard as "essential," it did not conclude that, in the unique context of municipal licensing, "prompt judicial review" means the issuance of a decision on a fixed, accelerated timetable.

[9] Section 8.195 thus stands in contrast to other statutory provisions, under which there is no right to judicial review at all. *E.g.*, Wis. Stat. §§ 227.52 (listing state administrative decisions not governed

tees the availability of judicial review, and provides that review will be available "promptly."[10]

2. THE TWO CONCERNS UNDERLYING THE "PROMPT JUDICIAL DETERMINATION" REQUIREMENT ARE INAPPOSITE HERE.

There is no basis to retreat from the view of the *FW/PBS* plurality and extend the "prompt judicial determination" requirement to encompass appeals from municipal licensing rulings. This Court adopted that requirement not because the First Amendment guarantees an adult business the right to engage in expression until a court rules to the contrary, as Petitioner mistakenly suggests, but rather as a prophylactic measure. Two specific concerns underlie the Court's decisions. First, absent a guarantee of a prompt judicial determination, exhibitors could engage in self-censorship, deterred from presenting their works to censors in the first instance. Because the administrative process must not "have a discouraging effect on the exhibitor," "the procedure must * * * assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Freedman*, 380 U.S. at 59; see also *Southeastern*

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by review procedures of the State Administrative Procedure Act), 893.80(4) (providing that no suit can be brought against certain municipal officers, agents or employees "for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions"). See also *Blount* v. *Rizzi*, 400 U.S. 410 (1971) (invalidating statute that failed to provide any avenue for judicial review).

[10] The judicial review procedures of WMC § 8.195 are at least as solicitous of the interests of adult businesses as those provided by other municipalities. Accepting Petitioner's argument accordingly would cut a very wide swath through the administrative practice of virtually every city and town in the country. See, *e.g.*, Alpharetta, GA Mun. Ord. 12-126 to -129; Anchorage, AK Code § 10.40.050(I), (L); Brownwood, TX Mun. Ord. § 158.508; Duluth, GA Code ch. 7, art. 14, §§ 7-605, 7-616 to -625; Duluth, MN Code ch. 5, art. IV, §§ 5-19, -22; Springdale, OH Mun. Ord. § 120.14.

Promotions, 420 U.S. at 561 ("And if judicial review is made unduly onerous, by reason of delay or otherwise, the board's determination in practice may be final."). Second, censors would be prone to determining erroneously that expression was not constitutionally protected, an inquiry that lies within the unique provenance of the courts. "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman*, 380 U.S. at 58; see also *Southeastern Promotions*, 420 U.S. at 560-61 ("An administrative board assigned to screening state productions – and keeping off stage anything not deemed culturally uplifting or healthful – may well be less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression.").

Petitioner cannot establish that either of the concerns that underlie the "prompt judicial determination" requirement is present in this context, in which a municipality does not purport to make any determination regarding whether expression is constitutionally protected and in fact provides substantial procedural protections throughout the administrative process (including, but hardly limited to, the availability of prompt judicial review).

a. Self-censorship.

An ordinance such as WMC § 8.195 does not present the risk that an applicant will be deterred from pursuing a license. As the plurality opinion in *FW/PBS* squarely concludes, "The license applicants * * * have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." 493 U.S. at 229-30. Compare *Freedman*,

380 U.S. at 59 ("The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation."). Indeed, Petitioner seems to recognize that an adult business will have extraordinary incentives to pursue both administrative and judicial review: "under a licensing scheme not just one or a few expressive works are at stake, but rather an entire ongoing" enterprise. Pet. Br. 35.

Numerous aspects of WMC § 8.195 confirm the conclusion of the *FW/PBS* plurality that adult businesses will not be deterred from applying to renew their licenses by the absence of a guaranteed "prompt judicial determination." Not only do adult businesses have a great economic stake in applying for renewal because an entire commercial enterprise rather than a single film is at stake, but the great bulk of the legal and factual development in the licensing process occurs, and the attendant costs are incurred, at the administrative – rather than judicial – level. Evidence is collected and witnesses are called only before the Common Council and the Appeals Board; the reviewing court is limited to determining whether the existing record provides substantial evidence for the City's decision not to renew a license. Pet. App. 8a. In addition, the only direct out-of-pocket cost – preparation of the record – must be borne by the City. Wis. Stat. § 68.13(2). The adult business knows that the burden of proof at the administrative stage will be on the City and that the City may not during the administrative proceedings challenge a ruling in the business's favor. Pet. App. 80a-81a. The ordinance also guarantees that the City will complete its review of the application both as an initial matter and on appeal in less time – fifty-one days – than the minimum time required to submit the application – sixty days – at which point immediate access to the courts is available. See *supra* at 8.

Just as important, an applicant can seek immediate relief from the court in the form of an order restraining termination of its license. Specifically, it may request "temporary relief pending disposition of the action or proceeding." Wis. Stat.

§ 781.02; see also *id.* § 813.02(1)(a) ("a temporary injunction may be granted"). Of note, the most rigorous element of the injunctive relief test – irreparable injury – is established by either a prohibition on protected expression (such as a license denial) or a showing that the failure to grant an injunction would render the permanent relief sought irrelevant (as when a business could show that it will be forced permanently out of business). *Werner* v. *A.L. Grootemaat & Sons*, 259 N.W.2d 310, 313-14 (Wis. 1977); *Elrod* v. *Burns*, 427 U.S. 347, 372 (1976).[11] Furthermore, if the trial court unduly delays deciding the case, the applicant may secure a writ of mandamus compelling the issuance of a ruling. *State ex rel. Fireman's Fund Ins. Co.* v. *Hoppmann*, 240 N.W. 884 (Wis. 1932).

For all of these reasons, it is quite unlikely that a putative applicant would conclude that the failure to provide a definite schedule under which a court will rule on an appeal from a licensing determination so infects the licensing process with indeterminacy that it simply is not worth the bother of applying at all.[12]

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[11] *Southeastern Promotions* v. *Conrad*, 420 U.S. 546 (1975), is not to the contrary. In that case, the court held that the availability of interim judicial relief did not provide sufficient procedural protections to satisfy the First Amendment when the underlying administrative proceedings involved an inquiry into the *content* of the plaintiff's production. *Id.* at 562. Injunctive proceedings in that context impermissibly imposed on the applicant the burdens of proceeding in court and persuading the judge to issue an injunction. *Id.* But as the plurality held in *FW/PBS*, an applicant for a license to operate an adult business may be required to carry both those burdens. 493 U.S. at 230.

[12] There may be rare cases in which the costs of pursuing judicial review will prove too great for an adult business to bear. See Pet. Br. 45. But that does not justify a *per se* rule prohibiting the termination of a license pending judicial determination. Instead, the relevant inquiry is whether the review scheme is such that the busi-

b. Judicial expertise.

Nor is a "prompt judicial determination" necessary as a prophylactic measure on the theory that courts, rather than municipalities, are uniquely suited to making the kind of licensing determination at issue in this case. At the outset, it is important to note that the Waukesha ordinance plainly provides the right to appeal a licensing decision in court upon the conclusion of administrative proceedings. Absent delays by the applicant, an appeal therefore will be available before the expiration of the applicant's license. The question accordingly is not whether judicial review should be *available*, but instead whether the courts are so singularly suited to making licensing determinations that the First Amendment compels deviating from the normal processes of judicial review.

The courts simply do not have such special expertise in this context. To the contrary, the criteria for a license renewal are entirely content neutral and within the traditional realm of municipal expertise. Unlike the content-based censorship schemes in *Freedman* and its progeny, WMC § 8.195 calls on the City to make determinations that have nothing to do with whether City News & Novelty is selling constitutionally protected expressive materials. Instead, the ordinance requires a

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ness will be deterred from applying for renewal in the first instance. Petitioner's much broader reading of the First Amendment would mean that adult businesses could not be closed even pending appeal in the courts – because they may not be able to afford those costs either – and (as we discuss below) would apply equally to prevent closure pending judicial review based on the adult business's failure to comply with innumerable generally applicable laws, such as the failure to pay taxes or to maintain sanitary conditions. Cf. *Young* v. *American Mini Theatres*, 427 U.S. 50, 78 (1976) (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression. * * * At most the impact of the ordinance on these interests is incidental and minimal.").

determination whether, for example, minors were on the premises of City News & Novelty and whether its customers were engaging in sex acts on the premises. The City thus enacted WMC § 8.195 with "neither the purpose or effect of imposing a limitation or the restriction on the content of any communicative materials," but instead to "combat and curb the adverse secondary effects brought on by adult oriented establishments." Pet. App. 97a. As this Court held in *City of Renton* v. *Playtime Theatres*, those are matters of municipal concern and expertise. 475 U.S. 41, 50 (1986); see also *State ex rel. Ruffalo* v. *Common Council of the City of Kenosha*, 157 N.W.2d 568 (Wis. 1968) (sustaining tavern license revocation on basis of secondary effects). Accord *Graff* v. *City of Chicago*, 9 F.3d 1309, 1333 (CA7 1993) (en banc) (Flaum, J., concurring) ("Clearly included among such nonthreatening schemes are those that only ask and allow administrators to make the kind of determinations for which they are especially suited; *e.g.* questions about city aesthetics, traffic flow or City Code violations. Certainly, the Ordinance is in that category of innocuous schemes which a specially mandated judicial review mechanism would only hamper through inappropriate and inefficient second-guessing of legitimate administrative decisions.").

The fact that violations of Section 8.195 may result in closure of an adult business does not render the ordinance a content-based speech restriction requiring an immediate determination on appeal. In *Arcara* v. *Cloud Books*, in which this Court approved the use of a nuisance action to close an adult bookstore, this Court rejected the adult business's argument that "the effect of the statutory closure remedy impermissibly burdens its First Amendment protected bookselling activities." 478 U.S. 697, 706 (1986). The Court explained that "this argument proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities," as when money that otherwise would be spent on advertising must go to pay a

civil damages award and when a thief who would otherwise publish is sent to prison. *Id.* Thus, "the imposition of the closure order has nothing to do with any expressive conduct at all." *Id.* at 706 n.2; see also *id.* at 707 ("The legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity."). Justice O'Connor similarly explained in her concurring opinion that "[a]ny other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment." *Id.* at 708.

Relatedly, Waukesha's interest in enforcing the ordinance "is unrelated to the suppression of free expression." *Barnes* v. *Glen Theatre*, 501 U.S. 560, 570 (1991) (Rehnquist, C.J., joined by O'Connor and Kennedy, JJ.); *id.* at 572 ("The statutory prohibition is not a means to some greater end, but an end in itself."); *id.* at 575 n.3 (Scalia, J., concurring) ("A law is 'general' for the present purposes if it regulates conduct without regard to whether that conduct is expressive."). Instead, the ordinance seeks only to eliminate "the secondary effects of such theaters on the surrounding community," which is a "vital governmental interest[]." *City of Renton* v. *Playtime Theatres*, 475 U.S. 41, 47, 50 (1986); see also *City of Erie* v. *Pap's A. M.*, 120 S. Ct. 1382, 1395 (2000) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy and Breyer, JJ.) ("efforts to protect public health and safety are clearly within the city's police powers"); *Barnes* v. *Glen Theatre*, 501 U.S. 560, 568 (1991) (Rehnquist, C.J., joined by O'Connor and Kennedy, JJ.) ("[T]he statute's purpose of protecting societal order and morality is clear from its text and history."); *id.* at 569 ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." (citing *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973))); *Young* v. *American Mini Theatres*, 427 U.S.

50, 80 (1976) (Powell, J., concurring) ("Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values.").[13]

Even more directly than in *City of Erie* v. *Pap's A. M.*, in which the Court sustained an ordinance banning public nudity that effectively prohibited totally nude dancing and admittedly "may not greatly reduce these secondary effects," the Waukesha ordinance is thus valid because it "is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments * * * and not at suppressing [any] message." 120 S. Ct. 1382, 1392, 1397 (2000) (opinion of O'Connor, J., joined by

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[13] Well-reasoned opinions of the courts of appeals support the same conclusion. *E.g.*, *TK's Video* v. *Denton County, Tex.*, 24 F.3d 705, 707 (CA5 1994) (per Higginbotham, J.) ("The order, by its own terms, combats pernicious side effects of adult businesses such as prostitution, disease, street crime, and urban blight. It does not censor, prevent entrepreneurs from marketing, or impede customers from obtaining communicative material."); *Graff* v. *City of Chicago*, 9 F.3d 1309, 1331 (CA7 1993) (en banc) (Flaum, J., concurring) ("Moreover, uncritically extending *Freedman*'s reach to strike down the Ordinance for lack of judicial review, by attributing broad significance to language in later cases that dealt with schemes substantially dissimilar from the one at issue here, would embark us upon a senseless departure from the core logic undergirding the holdings in *Freedman* and its progeny; for neither the purpose nor effect of the Ordinance, unlike the laws challenged in that line of cases, is to involve the licensor in any decisionmaking of constitutional proportion."); *id.* at 1335 (Ripple, J., concurring) ("The concerns the Court voiced in * * * *FW/PBS* are not present here. The Chicago ordinance sets forth criteria according to which a permit must be evaluated. Furthermore, there is a time limit within which city officials must respond to the application. In no way does the ordinance place unfettered discretion in the hands of city officials. As a result, there is no risk of either hidden or self censorship.").

Rehnquist, C.J., and Kennedy and Breyer, JJ.). Here, as there, "[t]he State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood." *Id.* at 1393. The First Amendment accordingly gives municipalities a "freer hand" in this area. *Id.* at 1396 (citing *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989)).[14]

Several other aspects of the administrative process guaranteed by WMC § 8.195 minimize the risk of an erroneous determination prejudicing an adult business. As the lower courts squarely held, the criteria for renewal set forth in the ordinance are clear and objective. Pet. App. 15a, 59a. The adult business has the right not only to submit evidence and legal argument, but also to call, subpoena, and cross-examine witnesses. Wis. Stat. § 68.11(2); WMC § 2.11(3). (Petitioner's statement that "the ordinance does not provide any tools of discovery by which the licensee can challenge the credibility of the witnesses against him or her," Pet. Br. 38, is thus simply wrong.) The adult business, but not the City, may appeal licensing determinations at any stage of the administrative process, and is assured that the administrative review will conclude prior to the expiration of its license. Indeed, the adult business has the right to select (as City News & Novelty did in this case) to pursue not just one but *two* administrative

[14] The fact that WMC § 8.195 is directed only at the secondary effects of adult businesses rather than the expressive nature of their wares is of course relevant for another important reason as well. This Court's precedents firmly establish that such a content-neutral regulation – unlike, for example, the censorship schemes in *Freedman* and *Southeastern Promotions* – presents far fewer risks that the government will seek to suppress unpopular speech. *Turner Broadcasting Sys.* v. *FCC*, 520 U.S. 180, 213 (1997).

appeals before impartial decisionmakers prior to proceeding to court.

As a matter of both expertise and separation of powers, the Wisconsin courts thus quite properly apply a deferential standard of review in reviewing a licensing determination. In a certiorari action, the court does not take new evidence or reach de novo factual conclusions. Instead, it reviews the administrative record to determine whether the municipality's factual determinations are supported by substantial evidence, Pet. App. 8a, the standard traditionally applied when the judiciary recognizes that another body has the expertise to reach factual conclusions and that the role of the courts is to check capricious administrative action. The court also confirms that the municipality's determinations were not "arbitrary, oppressive or unreasonable," *id.*, again inquiries that bespeak deference rather than judicial expertise. Cf. *Chevron U.S.A.* v. *NRDC*, 437 U.S. 837 (1984).[15]

To be sure, the judiciary has expertise superior to a municipality in one respect: resolving constitutional challenges to the ordinance itself, as opposed to the fact-bound inquiries into the adult business's compliance with the ordinance. But the exhaustion requirements of Section 8.195 do not apply to constitutional challenges and, indeed, such challenges cannot even be brought in the administrative process. Pet. App. 56a (citing *Kmiec* v. *Town of Spider Lake*, 211 N.W.2d 471, 473-74 (Wis. 1973)). As Petitioner's own *amici* recognize, "All

[15] Contrary to Petitioner's suggestion, Br. 35, this case is not akin to *Southeastern Promotions* v. *Conrad*, in which municipal officials were called upon to engage in the "appraisal of facts, the exercise of judgment, and the formation of an opinion." 420 U.S. 546, 554 (1975) (quoting *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940)). As the Court explained in an accompanying footnote, the appraisals, judgments, and opinions in *Southeastern Promotions* related to "the *content* * * * of the production." *Id.* 554 n.7 (emphasis added).

litigants possess the right to challenge a statute – even if it does not impose a prior restraint – on constitutional grounds," by filing a plenary action in court. Liberty Project Br. 13 n.5. Petitioner is therefore wrong in arguing that in the case of such a constitutional challenge the ordinance "forces the denied applicant to sink valuable time and energy into a pointless effort, and works a postponement of the only review that can provide relief, judicial review." Pet. Br. 39-40.

Specifically, an adult business has at least two avenues to bring such a constitutional challenge directly in court without any delay whatsoever. City News & Novelty has in fact used *both* avenues to challenge WMC § 8.195, although it does not acknowledge either in its brief. First, an adult business can bring a declaratory judgment action in state court. See Wis. Stat. § 806.04. Thus, in 1990, City News & Novelty brought such an action challenging the constitutionality of Section 8.195's requirement that booths for viewing adult films have open entrances. See Resp. Lodging, vol. I, tab 15. Waukesha prevailed in both the trial and appellate courts. See *City News & Novelty, Inc.* v. *City of Waukesha*, 487 N.W.2d 316, 317 (Wis. Ct. App. 1992). Second, an adult business can bring an action in federal court under 42 U.S.C. § 1983. See generally *Patsy* v. *Board of Regents*, 457 U.S. 496, 500-01 (1982) (no administrative exhaustion requirement applies to Section 1983 actions); see also Wis. Stat. § 68.01 (remedies under statutory scheme "shall not be exclusive"). Indeed, while the administrative proceedings were pending *in this very case*, City News & Novelty brought such a suit in the Eastern District of Wisconsin raising a variety of constitutional challenges to WMC § 8.195. See Resp. Lodging, tab 16. Immediately after the case was assigned to a district judge, Petitioner elected to voluntarily dismiss its suit and to bring all

those claims on appeal from the City's subsequent licensing determination.[16]

3. PETITIONER'S REMAINING ARGUMENTS ARE UNAVAILING.

The various reasons asserted by Petitioner for adopting a mandatory stay of licensing determinations in fact support only the *availability* of judicial review, which WMC § 8.195 indisputably provides. Petitioner's arguments do not justify disabling a municipality's orderly implementation of a duly rendered determination that an adult business is, for reasons entirely unrelated to the nature of its expression, not entitled to a license to operate. For example, Petitioner maintains that the grounds invoked by the municipality may not be sufficient, as a constitutional matter, to justify the sanction of closure. But as we explained *supra* at 37-38, a licensee may at any time go directly to court to bring a facial challenge to the grounds that will justify nonrenewal. Even more important for present purposes, Petitioner's arguments simply establish that in this area, like all others, a municipality may make a mistake that should be subject to judicial review.

Petitioner's remaining arguments rest on a series of insupportable, gratuitous insults regarding the fidelity of every level of municipal government to the Constitution and to the rule of law. Without citation to a wisp of support, much less actual record evidence, Petitioner maintains that the Constitution requires constant judicial superintendence over local decisionmaking because municipal officials are "institutionally

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[16] Exhaustion of administrative remedies is also not required if a business seeks to contest the City's determination that it must have a license to operate. And the licensing ordinance would be entirely inapplicable if an adult business located in Waukesha sought to sell products through the Internet or by telephone. If an adult business has no storefront visited by customers, the risks of secondary effects are reduced. Accordingly, Respondent does not read WMC § 8.195 to apply in that situation.

more concerned with enforcement than with protecting constitutional rights" and "disregard[] all constitutional protections." Pet. Br. 32, 34.

The point need not be belabored. It is enough here to note the clear and uncontradicted record in this case, in which Waukesha officials accommodated every conceivable request by City News & Novelty and, indeed, agreed not to withdraw Petitioner's license until its constitutional challenge was addressed in the state circuit court. Here, as in *Arcara* v. *Cloud Books*, "there is no suggestion on the record before us that the closure of respondents' bookstore was sought under [ordinance] as a pretext for the suppression of First Amendment protected material." 478 U.S. 697, 707 (1986). Any such allegation would, in any event, be brought instead as "a claim of selective prosecution." *Id.* (citing *Wayte* v. *United States*, 470 U.S. 598 (1985)); see also *id.* (O'Connor, J., concurring) (concluding that it would be improper to rest decision on unsupported allegations of bias because "there is no suggestion in the record or opinion below of such pretextual use of" nuisance statute).

4. ACCEPTING PETITIONER'S ARGUMENT WOULD CAUSE SUBSTANTIAL, UNWARRANTED HARM TO IMPORTANT MUNICIPAL AND JUDICIAL INTERESTS.

There are additional important reasons for not extending the "prompt judicial determination" requirement into the context of content-neutral municipal licensing schemes. Cases such as *Freedman* and *Southeastern Promotions* focused on the interests of speakers because a "prompt judicial determination" requirement did not involve any risk that the public interest or the operation of the courts would be undermined. Not so here. Petitioner's theory, if accepted, would seriously interfere with municipalities' efforts to combat the secondary effects of adult businesses. See *City of Erie*, 120 S. Ct. at 1396 ("the government should have sufficient leeway to justify such a law based on secondary effects"); *Young* v. *American Mini Theatres*, 427 U.S. 50, 71 (1976) (city's interest in combating secondary effects is "one that must be accorded high respect"). Moreover, because Petitioner's argument would apply to every kind of regulation of every kind of expressive business, it would flood local courts with claims that as a federal constitutional matter must be given "first priority."

Moreover, on Petitioner's view, the Constitution grants an adult business a *per se* right to operate until a court says otherwise. Petitioner thus seeks a radical expansion of the *Freedman* line of cases. The most that the Court has ever required is a "prompt judicial determination" on review of an act of censorship. It has never required, as Petitioner urges, that the government "stay" implementation of its decision pending a ruling by the courts. Here, by contrast, Petitioner contends that the City's determination that, for reasons totally unrelated to the content of any speech, City News & Novelty is not entitled to an adult-business license must be stayed until a Wisconsin circuit court confirms that substantial evidence supports the City's determination that City News & Novelty had engaged in the nine different ordinance violations that were established in the administrative proceedings. (That notwithstanding that several of the violations were proven by sworn testimony of police officers, while others were duly confirmed by convictions of officers of City News & Novelty for ordinance violations.) In the meantime, the City's substantial interest in enforcing its laws, and specifically in avoiding the secondary effects of adult businesses, would be substantially undermined.

When targeted efforts to combat secondary effects fail – as in this case, in which Petitioner violated WMC § 8.195 and the City found minors on Petitioner's premises and customers committing sex acts on the premises – the municipality has an obligation to withdraw the adult business's license to operate. On Petitioner's alternate view, the business effectively has a free pass to violate the law, knowing that it cannot be closed until not only the administrative but also the judicial process

is completed. It therefore is not true, as Petitioner maintains, that "[w]ith a guaranteed stay throughout the first level of judicial review, * * * the City's inability to control the pace of litigation in the circuit court, which the court below found determinative, ceases to be a concern." Pet. Br. 47 (emphasis omitted).[17]

The total illogic of Petitioner's reading of *Freedman* and its progeny is also plain when it is applied to the context of an initial application for a license to operate. Such putative licensees have every much as great a First Amendment interest as existing adult businesses. If Petitioner is correct that an adult business will be deterred by the prospect of having to proceed through the administrative and judicial processes without a license to operate, then presumably a municipality must grant a license to everyone who requests one until a court says otherwise. But that simply cannot be the case.

The awesome expanse of Petitioner's proposed holding makes these concerns graver still. If adopted, the same rule would necessarily apply to all other content-neutral regulations. Zoning is the most obvious, as when a City seeks to restrict adult businesses to a particular area or class of property. But it is hard to see how the government could close an adult business for violating *any* of innumerable, generally ap-

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[17] It is for this reason that Petitioner is also wrong to argue that a municipality may, in certain limited and extremely urgent circumstances, bring a state-law nuisance action in an attempt to close an adult business. Pet. Br. 41-42. The First Amendment does not impose such an obligation on a municipality. Instead, if an adult business can make a sufficient showing that the administrative licensing determination was erroneous, it may (as was explained *supra*) secure an order restraining the City from terminating the license. Neither logic nor precedent requires that a municipality indefinitely stay its hand in this manner. Indeed, the plurality opinion in *FW/PBS* squarely held that a municipality need not bear the burden of going to court simply to deny a license application. 493 U.S. at 230.

plicable laws. *E.g.*, Wis. Stat. § 134.71 (requiring dealers in second-hand goods, who frequently resell books and movies, to be licensed as measure designed to combat sale of stolen property). Thus, nothing in the First Amendment calls for more prompt or searching judicial review of a municipal determination that minors were found on the premises of an adult business, see WMC § 8.195(10)(c), than determinations under the tax code or the sanitation laws. Cf. *California* v. *Grace Brethren Church*, 457 U.S. 393, 417 n.36 (1982). Of equal concern, the same broad prohibition on closure would also apply, *a fortiori*, to every other kind of expressive business, including publishers, newsstands, movie theaters, and video rental stores, effectively working a wholesale transfer of this fundamental area of municipal control to the state courts. *E.g.*, *Graff* v. *City of Chicago*, 9 F.3d 1309 (CA7 1993) (en banc) (applying *Freedman* and *FW/PBS* to licensing scheme for newsstands); cf. *Young* v. *American Mini Theatres*, 427 U.S. 50, 62 (1976) (although "adult films may only be exhibited commercially in licensed theaters," "that is also true of all motion pictures"). Petitioner's argument also would apply not just to purely adult businesses, but also to those that, like City News, sell many other products such as drug paraphernalia.

Finally, Petitioner's proposed rule would create a perverse and counterproductive set of incentives in all these areas. License applicants would invariably seek to delay the administrative process, safe in the knowledge that they will have a constitutional right to operate until the case is eventually decided in court. In this case, for example, once Waukesha announced that it would not withdraw City News & Novelty's license pending judicial review (equivalent to the mandatory stay Petitioner urges this Court to adopt), Petitioner engaged in a variety of delay tactics, both on administrative appeal and in court. See *supra* at 11-12. At the very least, any applicant that ever considered not filing a judicial appeal would certainly do so if Petitioner's approach were adopted, seriously

overburdening the courts. Furthermore, Petitioner's proposed rule would give municipalities a substantial incentive to provide fewer procedural protections to license applicants in order to move the matter immediately into court, shortening administrative hearings and opportunities for briefing. That is a particular problem when, as in Wisconsin, a reviewing court must consider the matter based exclusively on the record developed in the administrative proceedings. Pet. App. 8a.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Wisconsin should be affirmed.

Respectfully submitted,

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Dated: October 26, 2000

APPENDIX

8.195 Adult Oriented Establishments

(Preamble to Sec. 8.195 Rep. & Recr. #28-95) WHEREAS, it is a lawful purpose of the Common Council for the City of Waukesha to enact regulatory ordinances protecting and promoting the general welfare, health and safety of its citizens; and

WHEREAS, the City is empowered to enact such ordinances pursuant to the Constitution and Laws of the State of Wisconsin; and

WHEREAS, the Common Council, based on the experience of other cities including Seattle and Renton, Washington, and Detroit, Michigan, has previously determined as set forth in sec. 22.50 of the Waukesha Municipal Code that adult oriented establishments can contribute to the impairment of the character and quality of surrounding residential neighborhoods, and contribute to the decline and the value of surrounding properties; and

WHEREAS, further studies in other communities across the United States such as St. Paul, Minnesota; Indianapolis, Indiana; Austin, Texas and Phoenix, Arizona have documented that the secondary effects of adult oriented establishments affect property values, contribute to physical deterioration and blight, have a deleterious effect on both existing businesses around them and surrounding residential areas, including increased transiency, increased levels of criminal activities including prostitution, rape, assaults and other sex related crimes; and

WHEREAS, the Common Council believes that the experiences and studies of other communities set forth herein are relevant in addressing the secondary effects adult oriented establishments can have upon areas surrounding such establishments in the City of Waukesha; and

WHEREAS, many adult oriented establishments install booths with doors in which patrons can view adult oriented movies or video tapes or films or view other forms of adult entertainment; and

WHEREAS, it is has been found in Milwaukee and Kenosha Counties, Wisconsin; Chattanooga, Tennessee; Newport News, Virginia; and Marion County, Indiana, to name a few locales, that the viewing booths in adult oriented establishment have been and are being used by patrons of said establishments for engaging in sexual acts, particularly between males, including but not limited to intercourse, sodomy, oral copulation and masturbation, resulting in unsafe and unsanitary conditions in said booths; and

WHEREAS, Acquired Immune Deficiency Syndrome (AIDS) is a sexually transmitted disease which destroys the body's immune system, is always fatal, and has no known cure; and

WHEREAS, when this ordinance was originally enacted in 1989, statistics from the State of Wisconsin had indicated that as of July 25, 1986, 96 cases of AIDS were reported in the State including 54 that resulted in death and that Wisconsin could expect a ten fold increase in reported cases between 1986 and 1991; and

WHEREAS, as of January 1, 1995, the State of Wisconsin Department of Health and Social Services, Division of Public Health is projecting between 900-1300 new cases of AIDS during 1995 and 1996.

WHEREAS, the viral agents responsible for AIDS and other sexually transmitted diseases have all been isolated at one time or another from semen; and

WHEREAS, the City of Waukesha desires to combat and curb the adverse secondary effects brought on by adult oriented establishments and to protect the health, safety, and welfare of its citizens from increased crime, and to preserve and stabilize the neighborhoods of the City of Waukesha, and

to minimize the transmission of sexual diseases including AIDS; and

WHEREAS, although the provisions of this ordinance have neither the purpose or effect of imposing a limitation or restriction on the content of any communicative materials, the Common Council deems it to be in the interests of the City of Waukesha to provide for licensing and regulation of adult oriented establishments including, but not limited to, adult bookstores, adult mini-motion picture establishments, adult motion picture theaters and adult cabarets to combat and curb the secondary effects of such establishments.

NOW, THEREFORE, the Common Council of the City of Waukesha do ordain as follows:

ADULT ORIENTED ESTABLISHMENTS.

(1) DEFINITIONS:

Adult Bookstore. An establishment which has a facility or facilities, including but not limited to booths, cubicles, rooms or stalls, for the presentation of "adult entertainment", as defined below, including adult oriented films, movies or live performances for observation by patrons therein; or an establishment having as a substantial or significant portion of its stock in trade, for sale, rent, trade, lease, inspection or viewing, books, films, video cassettes, magazines or other periodicals, which are distinguished or characterized by their emphasis on matters depicting, describing or relating to specified anatomical areas or specified sexual activities as defined below.

Adult Cabaret. A cabaret which features topless dancers, strippers, male or female impersonators or similar entertainers.

Adult Entertainment. Any exhibition of any motion picture, live performance, display or dance of any type, which has as its dominant theme or is distinguished or characterized by an emphasis on any actual or simulated

specified sexual activities or specified anatomical areas as herein defined.

Adult Mini-Motion Picture Theater. An enclosed building with a capacity of less than 50 persons used for presenting material having as its dominant theme or distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as herein defined for observation by patrons therein.

Adult Motion Picture Theater. An enclosed building with a capacity of 50 or more persons used for presenting material having as its dominant theme or distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as defined below for observation by patrons therein.

Adult Oriented Establishment. Any premises including, but not limited to, "adult bookstores", "adult motion picture theaters", "adult mini-motion picture establishments" or "adult cabarets." It further means any premises to which public patrons or members are invited or admitted and which are so physically arranged so as to provide booths, cubicles, rooms, compartments, or stalls separate from the common area of the premises for the purposes of viewing adult oriented motion pictures, or wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, whether or not such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect. "Adult Oriented Establishment" further includes without being limited to any "adult entertainment studio" or any premises that is physically arranged and used as such whether advertised or represented as an adult entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, modeling studio, or any other term of like import.

"Booths", "Cubicles", "Rooms", "Compartments" or "Stalls". Enclosures as are specifically offered to the public or members of an adult-oriented establishment for hire or for a fee as part of a business operated on the premises which offers as part of its business the entertainment to be viewed within the enclosure. This shall include, without limitation, such enclosures wherein the entertainment is dispensed for a fee, but a fee is not charged for mere access to the enclosure. However, "booth", "cubicle", "room", "compartment" or "stall" does not mean such enclosures that are private offices used by the owners, managers or persons employed on the premises for attending to the tasks of their employment, which enclosures are not held out to the public or members of the establishment for hire or for a fee or for the purpose of viewing entertainment for a fee, are not open to any persons other than employees; nor shall this definition apply to hotels, motels or other similar establishments licensed by the State of Wisconsin pursuant to Chapter 50 of the Wisconsin Statutes.

Council. The City Council for the City of Waukesha, Waukesha County, Wisconsin.

Operators. Any person, partnership, or corporation operating, conducting, maintaining or owning any adult-oriented establishment.

Specified Anatomical Areas.

1. Less than completely and opaquely covered human genitals, pubic region, buttocks, and female breasts below the point immediately above the top of the areola.

2. Human male genitals in a discernible turgid state, even if opaquely covered.

Specified Sexual Activities. Simulated or actual:

1. Showing of human genitals in a state of sexual stimulation or arousal.

2. Acts of masturbation, sexual intercourse, sodomy, bestiality, necrophilia, sado-masochistic abuse, fellatio or cunnilingus.

3. Fondling or erotic touching of human genitals, pubic region, buttocks or female breasts.

(2) LICENSE.

(a) Except as provided in subsection (d) below, from and after the effective date of this section, no adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City.

(b) A license may be issued only for one adult oriented establishment located at a fixed and certain place. Any person who desires to operate more than one adult oriented establishment must have a license for each.

(c) No license or interest in a license may be transferred to any person.

(d) All adult oriented establishments existing at the time of the passage of this section must submit an application for a license within 60 days of the passage of this section.

(3) APPLICATION FOR LICENSE.

(a) Any person desiring to secure a license shall make application to the City Clerk. The application shall be filed in triplicate and dated by the City Clerk. A copy of the application shall be distributed promptly by the City Clerk to the City Police Department and to the applicant.

(b) The application for a license shall be upon a form provided by the City Clerk. An applicant for a license shall furnish the following information under oath:

1. Name and address.

2. Written proof that the individual is at least 18 years of age.

3. The address of the adult oriented establishment to be operated by the applicant.

4. If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the registered agents and the name and address of all shareholders owning more than 5% of the stock in such corporation and all officers and directors of the corporation.

(c) Within 21 days of receiving an application for a new license or an application to renew a license, the City Clerk shall notify the applicant whether the application is granted or denied.

(d) Whenever an application is denied, or a license is not renewed, the City Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter in conformity with sec. 68.11(2), (3), Wis. Stats. A final determination stating the reasons therefore, together with a copy of any official recording or transcript of the hearing, shall be rendered within 20 days of the commencement of the hearing. Judicial review shall be governed by sec. 68.13, Wis. Stats.

(e) Failure or refusal of the applicant to give any information relevant to the application or his refusal or failure to appear at any reasonable time and place for examination under oath regarding such application or his refusal to submit to or cooperate with regard to any information required by this section shall constitute an admission by the applicant that he is ineligible for

such license and shall be grounds for denial thereof by the City Clerk.

(4) STANDARDS FOR ISSUANCE OF LICENSE. To receive a license to operate an adult oriented establishment, an applicant must meet the following standards:

(a) If the applicant is an individual:

1. The applicant must be at least 18 years of age.

2. The applicant shall not have been found to have previously violated this section within 5 years immediately preceding the date of the application.

(b) If the applicant is a corporation:

1. All officers, directors, and stockholders required to be named under par. (3)(b) shall be at least 18 years of age.

2. No officer, director, or stockholder required to be named under par. (3)(b) shall have been found to have previously violated this section within 5 years immediately preceding the date of the application.

(c) If the applicant is a partnership, joint venture or any other type of organization where 2 or more persons have a financial interest:

1. All persons having a financial interest in the partnership, joint venture or other type of organization shall be at least 18 years of age.

2. No person having a financial interest in the partnership, joint venture or other type of organization shall have been found to have violated any provision of this section within 5 years immediately preceding the date of the application.

(5) FEES. A license fee of $250 shall be submitted with the application for a license. If the application is denied, 1/2 of the fee shall be returned.

(6) DISPLAY OF LICENSE OR PERMIT. The license shall be displayed in a conspicuous public place in the adult-oriented establishment.

(7) RENEWAL OF LICENSE OR PERMIT.

(a) Every license issued pursuant to this section will terminate at the expiration of one year from date of issuance, unless sooner revoked and must be renewed before operation is allowed in the following year. Any operator desiring to renew a license shall make application to the City Clerk. The application for renewal must be filed not later that 60 days before the license expires. The application for renewal shall be upon a form provided by the City Clerk and shall contain such information and data given under oath or affirmation as is required for an application for a new license.

(b) A license renewal fee of $250 shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of $100 shall be assessed against any applicant who files for a renewal less than 60 days before the license expires. If the application is denied, 1/2 of the total fees collected shall be returned.

(c) If the City Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the City Clerk.

(d) The building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance.

(e) In a zoning district in which a use licensed under this section is a nonconforming use under the zoning provisions of this code, no location or premises

for which a license has been issued shall be used as an adult oriented establishment for one year following the date the nonrenewal of the license takes effect. For purposes of this paragraph a nonrenewal of a license takes effect when the licensed premises ceases operations as an adult oriented establishment.

(8) REVOCATION OF LICENSE.

(a) The Council shall revoke a license or permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application or material facts were omitted from any application.

2. The operator or any employee of the operator violates any provision of this section or any rules or regulation adopted by the Council pursuant to this section provided, however, that in the case of a first offense by an operator where the conduct was solely that of an employee, the penalty shall not exceed a suspension of 30 days if the Council shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of due diligence have had such actual or constructive knowledge.

3. The operator becomes ineligible to obtain a license or permit.

4. Any cost or fee required to be paid by this Section is not paid.

5. Any intoxicating liquor or cereal malt beverage is served or consumed on the premises of the adult oriented establishment.

(b) The Council, before revoking or suspending any license or permit, shall give the operator at least

10 days written notice of the charges against him and the opportunity for a public hearing before the Council or its designated committee as provided herein. The Council or its designated committee shall provide a written determination whether to revoke or suspend the license or permit within five (5) days of the public hearing. Any appeal from the determination of the Council or its designated committee shall be taken pursuant to secs. 68.10-68.12, Wis. Stats.

(c) The transfer of a license or any interest in a license shall automatically and immediately revoke the license.

(d) Any operator whose license is revoked shall not be eligible to receive a license for one year from the date of revocation. No location or premises for which a license has been issued shall be used as an adult oriented establishment for six (6) months from the date of revocation of the license. In a zoning district in which a use licensed under this section is a nonconforming use under the zoning provisions of this code, no location or premises for which a license has been issued shall be used as an adult oriented establishment for one year following the date the revocation of the license takes effect. For purposes of this paragraph a revocation of a license takes effect when the licensed premises ceases operations as an adult oriented establishment.

(9) PHYSICAL LAYOUT OF ADULT ORIENTED ESTABLISHMENT. Any adult oriented establishment having available for customers, patrons or members, any booth, room or cubicle for the private viewing of any adult entertainment must comply with the following requirements:

(a) Access. Each booth, room or cubicle shall be totally accessible to and from aisles and public areas of the adult oriented establishment and shall be unob-

structed by any door, lock or other control-type devices.

(b) Construction. Every booth, room or cubicle shall meet the following construction requirements:

1. Each booth, room or cubicle shall be separated from adjacent booths, rooms or cubicles and any non-public areas by a wall.

2. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same.

3. All walls shall be solid and without any openings, extended from the floor to a height of not less than 6 feet and be light colored, non-absorbent, smooth textured and easily cleanable.

4. The floor must be light colored, non-absorbent, smooth textured and easily cleanable.

5. The lighting level of each booth, room or cubicle, when not in use shall be a minimum of ten foot candles at all times, as measured from the floor.

(c) Occupants. Only one individual shall occupy a booth, room or cubicle at any time. No occupants of same shall engage in any type of sexual activity, cause any bodily discharge or litter while in the booth. No individual shall damage or deface any portion of the booth.

(d) Inspections. The Building Inspector shall conduct monthly inspections of the premises to insure compliance with the provisions of this subsection.

(10) RESPONSIBILITIES OF THE OPERATOR.

(a) Every act or omission by an employee constituting a violation of the provisions of this Section shall be deemed the act or omission of the operator is such act or omission occurs either with the authorization, knowledge, or approval of the operator, or as a result of the operator's negligent failure to supervise the employee's conduct, and the operator shall be punishable for such act or omission in the same manner as if the operator committed the act or caused the omission.

(b) Any act or omission of any employee constituting a violation of the provisions of this section shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed.

(c) No employee of an adult oriented establishment shall allow any minor to loiter around or to frequent an adult oriented establishment or to allow any minor to view adult entertainment as defined herein.

(d) The operator shall maintain the premises in a clean and sanitary manner at all times.

(e) The operator shall maintain at least 10 foot candles of light in the public portions of the establishment, including aisles, at all times. However, if a lesser level of illumination in the aisles shall be necessary to enable a patron to view the adult entertainment in a booth, room or cubicle adjoining an aisle, a lesser amount of illumination may be maintained in such aisles, provided, however, at no time shall there be less then one foot candle of illumination in said aisles, as measured from the floor.

(f) The operator shall insure compliance of the establishment and its patrons with the provisions of this section.

(11) ADMINISTRATIVE REVIEW PROCEDURE. The City ordinances and State law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

(12) PENALTIES AND PROSECUTION. Any person who shall violate any provisions of this Section or who shall fail to obtain a license or permit as required hereunder shall be subject to penalty as provided in §25.05 of this Municipal Code.

CHAPTER 68.

MUNICIPAL ADMINISTRATIVE PROCEDURE

68.001. Legislative purpose. The purpose of this chapter is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protection under the 14th amendment to the U.S. constitution.

68.01. Review of administrative determinations. Any person having a substantial interest which is adversely affected by an administrative determination of a governing body, board, commission, committee, agency, officer or employee of a municipality or agent acting on behalf of a municipality as set forth in § 68.02, may have such determination reviewed as provided in this chapter. The remedies under this chapter shall not be exclusive. No department, board, commission, agency, officer or employee of a municipality who is aggrieved may initiate review under this chapter of a determination of any other department, board, commission, agency, officer or employee of the same municipality, but may respond or intervene in a review proceeding under this chapter initiated by another.

68.02. Determinations reviewable. The following determinations are reviewable under this chapter:

(1) The grant or denial in whole or in part after application of an initial permit, license, right, privilege, or authority, except an alcohol beverage license.

(2) The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in § 68.03(5).

(3) The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant.

(4) The imposition of a penalty or sanction upon any person except a municipal employee or officer, other than by a court.

68.03. Determinations not subject to review. Except as provided in § 68.02, the following determinations are not reviewable under this chapter:

(1) A legislative enactment. A legislative enactment is an ordinance, resolution or adopted motion of the governing body of a municipality.

(2) Any action subject to administrative or judicial review procedures under other statutes.

(3) The denial of a tort or contract claim for money, required to be filed with the municipality pursuant to statutory procedures for the filing of such claims.

(4) The suspension, removal or disciplining or nonrenewal of a contract of a municipal employee or officer.

(5) The grant, denial, suspension or revocation of an alcohol beverage license under § 125.12(1).

(6) Judgments and orders of a court.

(7) Determinations made during municipal labor negotiations.

(8) Any action which is subject to administrative review procedures under an ordinance providing such procedures as defined in § 68.16.

(9) Notwithstanding any other provision of this chapter, any action or determination of a municipal authority which does not involve the constitutionally protected right of a specific person or persons to due process in connection with the action or determination.

68.04. Municipalities included. "Municipality", as used in this chapter, includes any county, city, village, town, technical college district, special purpose district or board or commission thereof, and any public or quasi-public corporation or board or commission created pursuant to statute, ordinance or resolution, but does not include the state, a state agency, a corporation chartered by the state or a school district as defined in § 115.01(3).

68.05. Municipal authority defined. "Municipal authority" includes every municipality and governing body, board, commission, committee, agency, officer, employee, or agent thereof making a determination under § 68.01, and every person, committee or agency of a municipality appointed to make an independent review under § 68.09(2).

68.06. Persons aggrieved. A person aggrieved includes any individual, partnership, limited liability company, corporation, association, public or private organization, officer, department, board, commission or agency of the municipality, whose rights, duties or privileges are adversely affected by a determination of a municipal authority.

68.07. Reducing determination to writing. If a determination subject to this chapter is made orally or, if in writing, does not state the reasons therefor, the municipal authority making such determination shall, upon written request of any person aggrieved by such determination made within 10 days of notice of such determination, reduce the determination and the reasons therefor to writing and mail or deliver such determination and reasons to the person making the request. The determination shall be dated, and shall advise such person of the right to have such determination reviewed, the time within which such review may be obtained, and the office or person to whom a request for review shall be addressed.

68.08. Request for review of determination. Any person aggrieved may have a written or oral determination reviewed by written request mailed or delivered to the municipal authority which made such determination within 30 days of notice to such person of such determination. The request for review shall state the ground or grounds upon which the

person aggrieved contends that the decision should be modified or reversed. A request for review shall be made to the officer, employee, agent, agency, committee, board, commission or body who made the determination but failure to make such request to the proper party shall not preclude the person aggrieved from review unless such failure has caused prejudice to the municipal authority.

68.09. Review of determination. (1) Initial determination. If a request for review is made under § 68.08, the determination to be reviewed shall be termed an initial determination.

(2) Who shall make review. A review under this section may be made by the officer, employee, agent, agency, committee, board, commission or body who made the initial determination. However, an independent review of such initial determination by another person, committee or agency of the municipality may be provided by the municipality.

(3) When to make review. The municipal authority shall review the initial determination within 15 days of receipt of a request for review. The time for review may be extended by agreement with the person aggrieved.

(4) Right to present evidence and argument. The person aggrieved may file with the request for review or within the time agreed with the municipal authority written evidence and argument in support of the person's position with respect to the initial determination.

(5) Decision on review. The municipal authority may affirm, reverse or modify the initial determination and shall mail or deliver to the person aggrieved a copy of the municipal authority's decision on review, which shall state the reasons for such decision. The decision shall advise the person aggrieved of the right to appeal the decision, the time within which appeal shall be taken and the office or person with whom notice of appeal shall be filed.

68.10. Administrative appeal. (1) From initial determi-

nation or decision on review. (a) If the person aggrieved did not have a hearing substantially in compliance with § 68.11 when the initial determination was made, the person may appeal under this section from the decision on review and shall follow the procedures set forth in §§ 68.08 and 68.09.

(b) If the person aggrieved had a hearing substantially in compliance with § 68.11 when the initial determination was made, the person may elect to follow the procedures provided in §§ 68.08 and 68.09, but is not entitled to appeal under this section unless granted by the municipal authority. The person may, however, seek review under § 68.13.

(2) Time within which appeal may be taken under this section. Appeal from a decision on review under § 68.09 shall be taken within 30 days of notice of such decision.

(3) How appeal may be taken. An appeal under this section may be taken by filing with or mailing to the office or person designated in the municipal authority's decision on review, written notice of appeal.

68.11. Hearing on administrative appeal. (1) Time of hearing. The municipality shall provide the appellant a hearing on an appeal under § 68.10 within 15 days of receipt of the notice of appeal filed or mailed under § 68.10 and shall serve the appellant with notice of such hearing by mail or personal service at least 10 days before such hearing.

(2) Conduct of hearing. At the hearing, the appellant and the municipal authority may be represented by an attorney and may present evidence and call and examine witnesses and cross-examine witnesses of the other party. Such witnesses shall be sworn by the person conducting the hearing. The municipality shall provide an impartial decision maker, who may be an officer, committee, board, commission or the governing body who did not participate in making or reviewing the initial determination, who shall make the decision on administrative appeal. The decision maker may issue subpoenas. An appellant's attorney of record may issue a sub-

poena to compel the attendance of a witness or the production of evidence. A subpoena issued by an attorney must be in substantially the same form as provided in § 805.07(4) and must be served in the manner provided in § 805.07(5). The attorney shall, at the time of issuance, send a copy of the subpoena to the decision maker. The hearing may, however, be conducted by an impartial person, committee, board or commission designated to conduct the hearing and report to the decision maker.

(3) Record of hearing. The person conducting the hearing or a person employed for that purpose shall take notes of the testimony and shall mark and preserve all exhibits. The person conducting the hearing may, and upon request of the appellant shall, cause the proceedings to be taken by a stenographer or by a recording device, the expense thereof to be paid by the municipality.

68.12. Final determination. (1) Within 20 days of completion of the hearing conducted under § 68.11 and the filing of briefs, if any, the decision maker shall mail or deliver to the appellant its written determination stating the reasons therefor. Such determination shall be a final determination.

(2) A determination following a hearing substantially meeting the requirements of § 68.11 or a decision on review under § 68.09 following such hearing shall also be a final determination.

68.13. Judicial review. (1) Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision.

(2) If review is sought of a final determination, the record of the proceedings shall be transcribed at the expense of the person seeking review. A transcript shall be supplied to anyone requesting the same at the requester's expense. If the

person seeking review establishes impecuniousness to the satisfaction of the reviewing court, the court may order the proceedings transcribed at the expense of the municipality and the person seeking review shall be furnished a free copy of the transcript. By stipulation, the court may order a synopsis of the proceedings in lieu of a transcript. The court may otherwise limit the requirement for a transcript.

68.14. Legislative review. (1) The seeking of a review pursuant to § 68.10 or 68.13 does not preclude a person aggrieved from seeking relief from the governing body of the municipality or any of its boards, commissions, committees, or agencies which may have jurisdiction.

(2) If in the course of legislative review under this section, a determination is modified, such modification and any evidence adduced before the governing body, board, commission, committee or agency shall be made part of the record on review under § 68.13.

(3) The governing body, board, commission, committee or agency conducting a legislative review under this section need not conduct the type of hearing required under § 68.11.

68.15. Availability of methods of resolving disputes. This chapter does not preclude any municipality and person aggrieved from employing arbitration, mediation or other methods of resolving disputes, and does not supersede contractual provisions for that purpose.

68.16. Election not to be governed by this chapter. The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations.